MALEB SU

v.

PUBLIC PROSECUTOR & ANOTHER CASE

HIGH COURT MALAYA, SEREMBAN
HASHIM YEOP SANI FJ
[CRIMINAL APPEAL NOS. 2 & 8 OF 1984]
8 MARCH 1984

CRIMINAL LAW AND PROCEDURE: *Application to disqualify President, Magistrate from proceeding with the case - Dismissed - Whether dismissal disposed the rights of the accused to appeal - Bias in a judicial proceeding - Allegation of - Tests of - Application of the rule of ejusdem generis - Whether Attorney-General is the head of the Judicial Department.*

The two appeals are against the dismissal by a President and a Magistrate of the application made by the respective Counsel for the appellants. The application, submitted at the commencement of the hearing, was that the President or Magistrate should disqualify himself from proceeding with the case, in which the Public Prosecutor is a party. Since the Attorney-General is also the Public Prosecutor and has supervision and control of the Judicial Officers (President/Magistrate) it was alleged that there was a likelihood of bias.

The issues for determination are:

(a) The right to appeal and whether the dismissal of the application to disqualify, disposed of the rights of the accused persons;

(b) Whether the Attorney-General is the head of the Judicial Department.

Held:

[1] The dismissal of the application to disqualify did not finally dispose of the rights of the accused persons and the order is not a proper matter of appeal under s. 307 (i) of the Criminal Procedure Code.

[2] As regards allegation of bias, there must be proved a likelihood of bias and that reasonable suspicion of bias or bare allegations are insufficient. In both the cases legal bias has not been satisfactorily shown.

[3] There is nothing in law to say that the Attorney-General is head of the service; in fact he cannot be by virtue of Article 138 of the Constitution.

[No order on revision.]

Cases referred to:

Mohd. Amin Bros. v. Government of India [1950] AIR FC 37
PP v. Hoo Chang Chwen [1962] 28 MLJ 284
PP v. R.K. Menon & Anor. [1978] MLJ 152
The Queen v. Huggins & Anor. [1895] 1 QB 563
Regina v. Altrincham Justices [1975] 2 WLR 450
In re S. (A Barrister) [1981] 1 QB 688
Leeson v. General Council of Medical Education and Registration [1889] 43 Ch D 366
Healey v. Rauhina & Anor. [1958] NZLR 945
R. v. Camborne Justices, Exparte Pearce [1955] 1 QB 41

Legislation referred to:

Criminal Procedure Code, ss. 129(i)(b), 307(i)

For the appellants - James Ponniah; Abu Hashim b. Hj. Abu Bakar; Yusof Khan bin Ghows Khan; Seeralan
For the public prosecutor - Lim Beng Choon & Phang Ah Hee

JUDGMENT

Hashim Yeop Sani FJ:

These are appeals against the dismissal by a President and a Magistrate of application made by respective counsel at the commencement of hearing. The application was that the President or Magistrate should disqualify himself from proceeding with the grounds that he belonged to a service in which the Attorney-General is said to be the head of the service. Since the Attorney-General is also the Public Prosecutor and had supervision and control of these judicial officers it was alleged that there was a likelihood of bias.

First, the question of the right to appeal. Under s. 307 (i) of the Criminal Procedure Code any person dissatisfied with any judgment, sentence or order pronounced by the Magistrate in a criminal case may appeal to the High Court against any such judgment, sentence or order. There is no argument, in my opinion, that the *ejusdem generis* rule applies to the word "order" which is preceded by the words "judgment" and "sentence". The order must therefore be a final order in the sense that it is final in effect as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties. See discussion of this point in *Mohd. Amin Bros. v. Government of India* [1950] AIR FC 37. The order which finally disposes of the rights of the parties should be distinguished from a purely procedural ruling. See also *PP v. Hoo Chang Chwen* [1962] 28 MLJ 284 and *PP v. R.K. Menon & Anor.* [1978] MLJ 152. In the former case Rose CJ of Singapore dealt with an appeal on the admissibility of certain statements and the learned Judge held that the ruling of the Magistrate was procedural ruling and therefore not an appealable order. In the latter case Ajaib J also correctly took the view that a ruling on non-compliance with s. 129 (i) (b) of the Criminal Procedure Code was a procedural and non-appealable ruling.

In the present appeals the dismissal of the application to disqualify did not finally dispose of the rights of the accused persons and the order is in my opinion certainly not a proper matter for appeal under s. 307 (i) of the Criminal Procedure Code.

However notwithstanding the absence of the right to appeal it would be desirable in my opinion to exercise my revisionary powers to dispose of the issue in these appeals on the merit since the questions involved have created some degree of uncertainty among judicial officers.

Let us now see the reasoning behind the application by Counsel. It would seem clear from the record, at least in Criminal Appeal No. 8/1984, that the Counsel was not alleging bias but that "there shall not be any semblance of bias". In other words what was asked was that there must appear to be impartial adjudication and the circumstances did not permit that.

It would also appear that in Criminal Appeal No. 2/1984 and No. 2/1984 the presiding officers also thought that there was a likelihood of bias arising from the "system" as they understood it. But it is noteworthy however that the learned President in Criminal Appeal No. 2/1984 gave an assurance that there would not be any bias on his part in adjudicating the case before him.

There are two tests of bias in a judicial proceeding. Firstly whether there is actual bias. This does not apply here because there are no findings or convictions. Secondly whether there is a reasonable likelihood of bias.

In all those cases where the question of bias was in issue the appellate Court was asked to quash the findings or convictions on grounds of bias. See *The Queen v. Huggins & Anor*. [1895] 1 QB 563, *Regina v. Altrincham Justices* [1975] 2 WLR 450 and *in re s. (A Barrister)* [1981] 1 QB 688 among others.

A person who has a judicial duty to perform should disqualify himself from performing it if he has a pecuniary interest in the decision or if he has a bias which renders him incapable of being an impartial Judge. This principle was stated by Bowen LJ in his judgment in *Leeson v. General Council of Medical Education and Registration* [1889] 43 Ch D 366 at pp. 384-385. In the same case Fry LJ took a stricter view at p. 390 as follows:

> I think that it is a matter of public policy that, so far as is possible, judicial proceedings shall not only be free from actual basis or prejudice of the Judges, but that they shall be free from the suspicion of bias or prejudice.

In a situation where a likelihood of bias is alleged Lord Widgery LJ in *Regina v. Altrincham Justices* (*supra*) said:

> It is enough to show that there is a real likelihood of bias, or at all events that a reasonable person advised of the circumstances might reasonably suspect that the judicial officer was incapable of producing the impartiality and detachment..

I think the correct view also clearly stated in *Healey v. Rauhina & Anor*. [1958] NZLR 945, following *R. v. Camborne Justices, Exparte Pearce* [1955] 1 QB 41 in that if bias is alleged (other than pecuniary or proprietory bias) then there must be proved a real likelihood of bias and that reasonable suspicion of bias is insufficient. Thus, bare allegations (as done in the present case) are insufficient. *A fortiori* bare allegations before hearing had hardly commenced.

Finally, what is the "system" which Counsel said they fear would produce a likelihood of bias? The judicial and legal services is one of the public services mentioned in Article 132 (1) of the Federal Constitution. The authority which exercises jurisdiction over the officers of the service in matters of promotions and discipline is the Judicial and Legal Service Commission established under Article 138 of the Constitution of which the Attorney-General is only a member. There is nothing in law to say that the Attorney-General is head of the service; in fact he cannot be by virtue of Article 138 of the Constitution. An officer belongs to the judicial and legal service; but he may serve in various different capacities in the Judicial Department and Legal Department. As normal in the administrative set-up of the public service each department has its own head. And the Attorney-General is not the head of the Judicial Department. Thus looking at the legal and administrative framework governing the service I do not think the facts here warrant a conclusion of a real likelihood of bias. If such a conclusion is made it is not the sort of conclusion which in my opinion right thinking persons armed with the proper information and advice would entertain.

Based on the foregoing I do not think I should interfere with the orders made in the lower Courts in Criminal Appeals Nos. 2 and 8 of 1984. Legal bias has not been satisfactorily shown in both cases.

No order on revision.

Also found at [1984] 1 CLJ 378